Supreme Court, U.S.
FILED
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No. 95-768

In The

Supreme Court of the United States

October Term, 1995

ROBERT CLARK AND BILLIE CLARK, HUSBAND AND WIFE; ROBERT ANSON CLARK, A MINOR CHILD BY AND THROUGH HIS MOTHER AND NEXT FRIEND, BILLIE CLARK; BRANDI JONES AND BRITINI JONES, MINOR CHILDREN BY AND THROUGH THEIR MOTHER AND NEXT FRIEND, ANGELA MARIE JONES; BRANDON NEAL CLARK, A MINOR CHILD BY AND THROUGH HIS MOTHER AND NEXT FRIEND, MARY LOU DUVALL,

Petitioners,

vs.

THOMAS WILLIAM BRIEN, REPRESENTATIVE OF UNDERWRITERS AT LLOYD'S, LONDON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The question presented for review in the Petition is argumentative and unsupported by the record.

LIST OF PARTIES

Petitioners are: Robert Clark and Billie Clark, husband and wife; Robert Anson Clark, a minor child by and through his mother and next friend, Billie Clark; Brandi Jones and Britini Jones, minor children by and through their mother and next friend, Angela Marie Jones; and Brandon Neal Clark, by and through his mother and next friend, Mary Lou Duvall. All of the petitioners were plaintiffs in the lower court proceedings of this case and were the appellees before the United States Court of Appeals for the Tenth Circuit. None of the petitioners cross-appealed on any issue.

Respondent, Thomas William Brien, is the designated representative of Certain Underwriters at Lloyd's, London. Brien was one of defendants in the lower court proceedings, and was the only appellant before the Tenth Circuit Court of Appeals.

The parties listed above were the only parties involved in the appellate proceedings before the Tenth Circuit. There are no other parties to the instant action.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Thomas William Brien, Representative of Underwriters at Lloyd's, London, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners.

OPINIONS BELOW

The Section entitled "Opinions Below" on Page 2 of the Petition is inaccurate and incomplete.

On February 11, 1994, the United States District Court for the Western District of Oklahoma entered judgment on the jury verdict in favor of Petitioners on their claim of intentional infliction of emotional distress against the Respondent. A copy of this Judgment is attached to this brief as Respondent's Supplemental Appendix E. On February 16, 1994, the District Court entered its Order overruling Respondent's Renewed Rule 50(b) Motion for Judgment as a Matter of Law and Alternative Motion for New Trial. (App. C, 16a-18a, attached to Petition). Respondent appealed to the Tenth Circuit Court of Appeals.

On July 14, 1995, the Tenth Circuit Court of Appeals issued its Opinion, reversed the District Court's denial of Respondent's Rule 50(b) Motion for Judgment as a Matter of Law, and instructed the District Court to vacate the jury verdict and damage awards for each of the Petitioners and to enter judgment in favor of Respondent.

(App. B, 3a-15a, attached to Petition). This Opinion is reported at 59 F.3d 1082 (10th Cir., 1995).

On August 15, 1995, the Tenth Circuit entered its Order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing in Banc. (App. A, 1a-2a, attached to Petition).

STATEMENT OF THE CASE

On December 3, 1988, Petitioners, Robert Clark and Billie Clark, purchased an insurance policy on their homestead located in Purcell, Oklahoma. The policy was issued jointly by Respondent and Sphere Drake Insurance Company (a party defendant in the lower court, but not a party in the appeal). On January 11, 1989, Robert Clark contacted the insurance agent to inquire if his insurance policy covered one or two pieces of property. Mr. Clark advised that the legal description set out in his policy included a property at Wayne, Oklahoma, in which Clark had an interest, and his home in Purcell, Oklahoma. Acton, Inc., an authorized agent of the insurers, corrected the policy by endorsement to exclude the legal description on the Wayne property.

On January 17, 1989, Robert Clark again contacted the insurance agent advising, for the first time, that the property at Wayne had burned. It is undisputed that the Wayne property burned on December 29, 1988.

Acton, Inc. hired S&A Claims Services to find out information about the Clarks and their properties. An independent adjuster, Bill Bigbee, was hired by S&A to

gather this information. Bill Bigbee is not a direct employee of S&A, but is hired from time to time, on a case-by-case basis, to do adjusting work. During the course of gathering this information, Acton, Inc. discovered that the Clarks had had several mysterious fires in the past, as many as ten fires, involving property in which the Clarks had an interest, and some of which had destroyed houses on the very property that Respondent was insuring.[1] Acton, Inc., on January 19, 1989, mailed a notice of cancellation on the policy to the Clarks and the listed mortgagee on the policy. Respondent was contractually bound to give a 13-day written notice before cancellation could become effective as to the mortgagee. The effective date of cancellation as to the mortgagee was February 1, 1989. In the interim period, if the Clarks' house burned before that date, the Respondent would be obligated, under the policy, to pay the mortgagee. On January 24, 1989, a rescission, or no coverage letter, was mailed to the Clarks, and the full premium was returned.

On January 23, 1989, Robert Clark informed Acton, Inc. that he would be away from his property for a short period. Max Acton, principal of Acton, Inc., became concerned that the Clark home might burn before the cancellation was effective, and hired off-duty policemen and off-duty firemen to watch the Clark property. It is undisputed that these off-duty policemen and firemen were instructed to watch the Clark property around the clock, from the adjoining land known as the Green property, and to report any signs of fire or smoke to the fire

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[1] At trial, Robert Clark admitted to at least eight previous fires, four of which were at his residence in Purcell.

department. They were instructed to stay on the Green property, and they were to have no guns. It is also undisputed that the guards had permission to be on the Green property, and they had a key to the gate. All of the guards testified at trial that they did not try to hide or secrete themselves from view as they were merely watching the Clark property for the purpose of reporting a fire.

On January 26, 1989, Bill Bigbee, the independent adjuster, met with the Clarks at their property in Purcell and inspected the house, took measurements, and photographed the property. On January 31, 1989, Acton, Inc. faxed a letter to Respondent advising that Acton had information concerning multiple previous fires involving the Clarks, that he had cancelled the insurance policy, and that off-duty guards had been hired to watch the property to keep the house from burning until the policy had been effectively cancelled. In this letter, Acton asked Respondent for approval of his actions. On February 2, Respondent sent his response to Acton approving the actions taken by Acton.

. Petitioners brought this diversity action against Respondent and Sphere Drake alleging, among many other causes of action, that the Respondent was responsible for the guards' conduct under the doctrine of principal-agency liability, for intentional infliction of emotional distress.[2]

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[2] All of Petitioners' causes of action were disposed of in favor of Respondent either before or during trial except for intentional infliction of emotional distress and trespass, which were submitted to the jury. See Respondent's Supplemental Appendix E for disposition of all issues which were not appealed to the Tenth Circuit.

At trial, the Petitioners claimed that the guards hired to watch the property intentionally inflicted emotional distress on the Petitioners by being armed, and by trespassing on the Clarks' property. They further claimed that one of the guards or Bill Bigbee, the independent adjuster, had shot and killed their pet dog. One witness for the Petitioners, Donald Leonard, testified someone hired him to go on the Clark property and take pictures, and that he witnessed the dog being shot. Leonard testified that he believed he might have seen the man who hired him in court that day, and it was suggested that the man's name was Bigbee.

The case was submitted to the jury as to intentional infliction of emotional distress and trespass. The jury found in favor of both Respondent and Sphere Drake as to trespass, and in favor of Sphere Drake on intentional infliction of emotional distress. The jury found in favor of Petitioners and against Respondent on intentional infliction of emotional distress and awarded actual and punitive damages. The Court entered judgment on the jury verdict on February 11, 1995 (App. E). The trial court denied Respondent's Renewed Rule 50(b) Motion for Judgment as a Matter of Law on February 16, 1995 (Petition, App. C). Respondent appealed to the Tenth Circuit, who on July 14, 1995, reversed the trial court, set aside the jury verdict, and ordered that judgment be entered in favor of Respondent. (Petition, App. B). On August 15, 1995, the Court of Appeals denied Petitioners' Petition for Rehearing and Suggestion of Rehearing in Banc. (Petition, App. C).

Respondent accepts the Statement of the Case which is set out by the Court of Appeals in its Opinion filed July

14, 1995 (Petition, App. B, 5a-8a). The Court of Appeals casts the evidence, as it was required by law to do, in Petitioners' most favorable light.

Any statements or assertions made by Petitioners in their Statement of the Case (Petition, PP. 3-6) inconsistent with the above should be ignored by this Court because it is laced with misstatements of the true facts and evidence, contains findings of fact not supported by the record, and is argumentative. For example, there is nothing in the record to support the statement that the Clarks were denied police protection. During trial, the trial court sustained Respondent's Motion for Judgment as a Matter of Law on Petitioners' Civil Rights Claim. (App. E, 2).

There is nothing in the record to support the statement that Respondent authorized Acton, Inc. to hire an adjuster to obtain information on the Clarks and their property. (Petition, P. 4). The record shows that Acton, Inc. alone hired an independent adjuster to obtain this information.

There is nothing in the record to support Petitioners' statement that Bill Bigbee was put in charge of the surveillance operation. (Petition, P. 4). There is no evidence to support the statement by Petitioners that Acton, Inc. hired a separate investigator, Donald Leonard, to photograph the Clarks' property or photograph individuals entering or leaving the home. (Petition, P. 4).

The record does not support the notion that the guards were left on the property several days after the dog was shot. (Petition, P. 4). The record reveals that no one knew when the dog was shot. The dog disappeared and has never been found.

The Petitioners' claim that the guards trespassed on their property; however, even the jury found that there was no trespass. (App. E, 3).

The fact that the Petitioners have violated the record in their Statement of the Case is reason enough for this Court to deny certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DECISION IS IN CONFORMITY WITH OKLAHOMA LAW AND IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND ALL CIRCUIT COURTS OF APPEAL.

Petitioners would have this Court believe that the Appellate Court did not have the intelligence to review the record and determine the material facts which related to the issues before that Court. The Appellate Court's job here was to focus only on the intentional infliction of emotional distress claim, as it was the only claim appealed. The trial court, on the other hand, had been bombarded with copious amounts of evidence whereby Petitioners were trying to prove their other causes of action, such as false imprisonment, bad faith, trespass, Civil Rights violations and negligence. It is understandable that the trial court mistakenly denied Respondent's Rule 50(b) motion on the emotional distress claim.

The Petitioners claim that the Court of Appeals misconstrued the facts, made inconsistent findings of the facts, and then proceeded to misapply the law. It is the

Petitioners who have misstated the facts, and based upon those misstatements, have reached erroneous findings of fact, and then proceeded to cite case law to fit these ill-conceived findings. This should not be tolerated by this Court.

In addition to Petitioners stating facts that are unsupported by the record, they have also addressed new issues which were not even decided by the Court of Appeals. For instance, Petitioners claim that the hired guards trespassed on the Petitioners' property, and that the Petitioners were denied police protection. The jury found in favor of the Respondent on the Petitioners' claim for trespass. The trial court granted Respondent's Rule 50 Motion for Judgment as a Matter of Law on Petitioners' Civil Rights claim. The Petitioners did not cross-appeal.

Petitioners complain that the Court of Appeals erroneously found that Bill Bigbee, the independent adjuster, was hired to obtain information on the Clarks and their properties. Petitioners assert that this statement cannot be true because the insurance claim had already been denied and the policy had already been cancelled. Petitioners' assertions are not supported by the record. The record clearly reflects that Bigbee was gathering information both before and after rescission of the Clarks' policy, and certainly before the policy was effectively cancelled as to the mortgagee. Pursuant to the terms of the insurance contract, if the Clarks' property had burned before Respondent effectively cancelled as to the mortgagee, Respondent would be liable to the mortgagee for the loss regardless of what or who caused the fire.

The Petitioners also assert that the Court mistakenly found that Bill Bigbee served as an independent adjuster, instead of finding that he was a "supervisor" or a "principal" for the Respondent. Petitioners' assertions are based upon a combination of blatant invention of facts nowhere to be found in the record, misstatements of facts in the record, and inferences drawn therefrom. Only from Petitioners' imagination comes the statement that "Max Acton, Bill Starbuck, and Bill Bigbee together effectively are Lloyd's in Oklahoma". Acton, Inc. is an authorized writing agent for Certain Underwriters at Lloyd's, including Respondent; but the assertion by Petitioners that Max Acton issues all of Lloyd's policies in Oklahoma are unsupported by the record. The statement that Max Acton delegated the "Purcell operation" to Bigbee is a misstatement and not supported by the record. The statement that Bigbee was tied to Acton in that he reported the events of the "Purcell operations" to Acton is a misstatement and not supported by the record. The statement that Acton was paid for the work of Bigbee is a misstatement and not supported by the record. The assertion by Petitioners that Bigbee supervised, or was in charge of, the guards is a misstatement and not supported by the record.

The assertion by Petitioners that Respondent delegated their entire Oklahoma operations to Acton (Petition, P. 11), is contrary to the record. The record clearly reflects that on January 31, 1989, the last day the guards watched the Clark property, Mr. Acton faxed a letter to the Respondent requesting approval of those actions. The

record further shows that Acton, Inc. is merely the authorized writing agent for Respondent concerning the issuance of insurance policies.

The Court of Appeals correctly determined that Bill Bigbee was an independent adjuster. The record reflects that Mr. Bigbee was not a direct employee of either S&A Claims Service or Acton, Inc. He was hired on a case-by-case basis, and billed for his services and expense to S&A Claims Service, which in turn billed to Acton, Inc. It is undisputed that Bill Starbuck with S&A Claims hired Mr. Bigbee. There are no facts in the record from which a reasonable inference could be made that Bill Bigbee was either a supervisor or a principal for the Respondent. There is no evidence in the record to show that Respondent even knew who Bill Bigbee was.

According to Petitioners, the third mistake made by the Court of Appeals is that it refused to recognize "Petitioners' analysis" of this case and failed to follow **Bradbury v. Phillips Petroleum Company,** 815 F.2d 1356 (10th Cir. 1987). There is no merit in Petitioners' complaint, because Petitioners' "analysis" is based upon imaginary facts not in the record, misstatement of facts in the record, and unreasonable inferences drawn therefrom. Obviously, the Circuit Court reviewed the **Bradbury** case and found the facts in that case clearly distinguishable from the facts in this case, and determined **Bradbury** did not apply. The Appellate Court's decision is not inconsistent with **Bradbury**.

The Court of Appeals did what the trial court failed to do in ruling on Respondent's Rule 50(b) motion, and that is, it separated out what the guards were clearly

authorized to do (watch the Clark property from the adjoining land and report any fires to the fire department), and what action the guards allegedly did (allegedly shot and killed the Clarks' dog). Had the trial court performed its duty, it would have ruled, as did the Court of Appeals, that the Respondent was entitled to judgment as a matter of law on Petitioners' intentional infliction of emotional distress claim.

The Court of Appeals decision of July 14, 1995 reveals that it viewed the evidence in a light most favorable to the Petitioners, that it followed Oklahoma law, that it is consistent with the decisions of this Court and all Circuit Courts of Appeal. The same Oklahoma law cited by the Court of Appeals in this case was also cited by the Tenth Circuit in **All American Insurance Company v. Burns,** 971 F.2d 438, 446 (10th Cir. 1992).

II.

THE COURT OF APPEALS DECISION INVOLVES NO ISSUES OF FEDERAL OR CONSTITUTIONAL LAW AND RAISES NO NEW ISSUES OF IMPORTANCE WHICH WOULD WARRANT REVIEW BY THIS COURT.

This is a diversity case in which Oklahoma law applies. This is a simple case involving the doctrine of principal-agent liability which is a well-settled area of law, not only in Oklahoma, but in other jurisdictions. There are no issues raised in this appeal which would warrant this Court's review.

The Court of Appeals decision in this case is consistent with Oklahoma law, laws of sister-state jurisdictions,

and consistent with all other circuits, and this Court. Therefore, it is not necessary to review this case in order to clarify or correct inconsistent decisions.

The Court of Appeals decision involves no issues of either federal or constitutional law.

There are no new issues of any importance which would warrant review by this Court.

CONCLUSION

This case does not merit the Court's time or attention to the merits. Accordingly, the Petition should be denied.

Respectfully submitted,

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APPENDIX E – JOURNAL ENTRY OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA – FILED 2/10/94

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT CLARK and BILLIE CLARK, husband and wife, ROBERT ANSON CLARK, a minor child, by and through his mother and next friend, BILLIE CLARK, BRANDI JONES and BRITINI JONES, minor children by and through their mother and next friend, ANGELA MARIA JONES, BRANDON NEAL CLARK, a minor child, by and through his mother and next friend, MARY LOU DUVALL, Plaintiffs, vs. THOMAS WILLIAM BRIEN, representative, of UNDERWRITERS AT LLOYD'S LONDON and SPHERE DRAKE INSURANCE COMPANY, and STATE FARM FIRE AND CASUALTY COMPANY, Defendants.	Case No. CIV-89-2189-L (Filed Feb. 10, 1994)

JOURNAL ENTRY OF JUDGMENT

Before the Court is the journal entry of judgment pursuant to the Court's order for Plaintiffs to draft and

present to the Court a journal entry executed by all parties that disposes of all issues between the parties. It is the intention of this journal entry to reflect the correct status of the record as it would have appeared when the jury verdict was returned on December 17, 1993. It in no way reflects rulings on any motions or matters presented to the court since December 17, 1993.

On November 19, 1993, the Motion for Partial Summary Judgment of State Farm Fire and Casualty Company against Robert Clark and Billie Clark came on for the consideration of the Court and the Court granted partial summary judgment as to Slander of Title in favor of State Farm Fire and Casualty Company and against Robert Clark and Billie Clark. This disposed of all claims of Plaintiffs against State Farm Fire and Casualty Company in the instant case.

On December 10, 1993, the Court sustained the motion in limine of Thomas William Brien, representative of Underwriters at Lloyd's London and Sphere Drake Insurance Company prohibiting the introduction by Plaintiffs of evidence of violation of the Oklahoma Security Guard and Private Investigator Act, 59 O.S. Section 1750 et seq. for reason that the Court ruled that the act did not provide a private cause of action.

Jury trial commenced on December 13, 1993. At the close of Plaintiffs case in chief, the Court sustained the motions of Thomas William Brien, representative of Underwriters at Lloyd's London and Sphere Drake Insurance Company for judgment as a matter of law with regard to Plaintiffs' claim for violation of 42 U.S.C. Section 1983 and Plaintiffs' cause of action for Bad Faith

breach of an insurance contract by the Defendants. Further, the Defendants' Rule 50 motions for Judgment as a matter of law were also sustained as to plaintiffs' claims for negligence and false imprisonment.

At the end of presentation of all evidence on December 17, 1993, the jury instructions presented the issues of Intentional Infliction of Emotional Distress and Trespass to the jury. The duly empaneled jury, upon their oath, found as follows:

The jury returned a unanimous verdict against Defendant Thomas William Brien, representative of Underwriters at Lloyd's London, and in favor of Robert Clark, Billie Clark, Robert Anson Clark, Brandi Jones, Britini Jones, and Brandon Neal Clark on Plaintiffs' claim for intentional Infliction of Emotional Distress. The jury found damages against Thomas William Brien, representative of Underwriters at Lloyd's London, in the following amounts:

ACTUAL DAMAGES

For Robert Clark in the amount of Seventy-Five ($75,000.00) Thousand Dollars.

For Billie Clark in the amount of Seventy-Five ($75,000.00) Thousand Dollars.

For Robert Anson Clark in the amount of Seventy-Five ($75,000.00) Thousand Dollars.

For Brandi Jones in the amount of Fifty ($50,000.00) Thousand Dollars.

For Britini Jones in the amount of Fifty ($50,000.00) Thousand Dollars.

For Brandon Neal Clark in the amount of Fifty ($50,000.00) Thousand Dollars.

PUNITIVE DAMAGES

For Robert Clark in the amount of Thirty ($30,000.00) Thousand Dollars.

For Billie Clark in the amount of Thirty ($30,000.00) Thousand Dollars.

For Robert Anson Clark in the amount of Sixty-Five ($65,000.00) Thousand Dollars.

The jury found in favor of Thomas William Brien, representative of Underwriters at Lloyd's London and Sphere Drake Insurance Company and against Plaintiffs on the claim of Trespass. The jury found in favor of Sphere Drake Insurance Company and against Plaintiffs on the claim of Intentional Infliction of Emotional Distress.

Any recovery of damages for the minor children is subject to a separate journal entry which will supplement this journal entry of judgment and provide for trusts to be established for each minor child pursuant to 12 O.S. Section 83.

JUDGMENT IS HEREBY ENTERED PURSUANT TO THE JURY VERDICT.

/s/ Timothy D. Leonard
UNITED STATES
DISTRICT COURT JUDGE

ENTERED IN JUDGMENT
DOCKET ON 2-11-94

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